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IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

Cr.Appeal No. 279 OF 2002

(Memorandum of Criminal Appeal U/s 374(2) of Cr.P.C.)

APPELLANT IN JAIL : Chandrabhan S/o Motiram Satnami, aged 20 years, resident of Village Gabdi, Police Station Arjunda, District Durg.

Versus

RESPONDENT : State of Chhattisgarh, Through the District Magistrate Durg .

MEMORANDUM OF CRIMINAL APPEAL UNDER SECTION 374(2) OF Cr.P.C.

(1088)

Filed on 9/3/02

by

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.279/2002

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Chandrabhan

Versus

State of Chhattisgarh

Shri K.K.Dixit with Shri C.R.Sahu, Counsel for the appellant.

Shri Ashish Shukla, G.A. with Shri U.K.S.Chandel, P.L. for the State.

ORAL JUDGMENT

(Passed on 13th of January 2006)

This appeal is directed against the judgment dated 27.02.2002 delivered in Sessions Case No.376/2001 by Shri A. K. Samant Ray, First Additional Sessions Durg whereby the appellant was convicted under Section 450 and 376 (1) of the I.P.C. and was sentenced to undergo rigorous imprisonment for 7 years and a fine of Rs.200/- and in default of fine, to undergo additional R.I. for 3 months under Section 450 I.P.C. and to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.200/-, in default of which, to undergo further rigorous imprisonment for 3 months under Section 376 (1) of the I.P.C.

2. Briefly stated prosecution story is that on 17.8.2001 Budhwantin Bai P.W.9, who belonged to an agriculturist family, was alone at home being not well. Finding the prosecutrix alone in the house, the appellant forcibly entered the house of the prosecutrix.

(52)

closed the door from inside and committed rape on her. In the evening, when the parents returned from the field, the prosecutrix informed them about the occurrence. F.I.R. was lodged in Police Station Arjunda on 18.8.2001 vide Ex.P.9-A by the prosecutrix. Dr. (Smt.) M. Shrivastava P.W.3 examined the prosecutrix on 18.8.2001 and found no marks of external injury on her body. However, during internal examination, she found that the vagina of the prosecutrix was tight and admitted one little finger. There was a tear in the forchette with slight oozing of blood. There was a tear in the hymen at 6 'O' clock position with some oozing of blood. Dr. (Smt.) M. Shrivastava P.W.3 opined that the sexual intercourse was possibly done with the prosecutrix. Dr. Neeraj Shinde P.W.4 examined the accused-appellant and found that he was young a person of 19 years with no external injuries and well developed genitals and was capable of doing sexual intercourse. The ossification test for determination of age of the prosecutrix was conducted by Dr. A.K.Sahu P.W.10 who opined that age of the prosecutrix was about 15 years. Kotwari Birth Register wherein the date of birth of the prosecutrix had been recorded as 1.10.1986 at the time of birth was seized vide Ex.P.7.

3. After completion of investigation, the accused-appellant was prosecuted under Section 450 & 376 (1) of the I.P.C. The accused-appellant abjured the guilt, pleaded innocence and false implication in defence and led no evidence. The prosecution examined as many as 11 witnesses. Relying upon the unrebutted testimony of prosecutrix which was duly corroborated by medical evidence of

Dr. (Smt.) M. Shrivastava and also the evidence of Kotwar Romnath P.W.5 and the entry in the Kotwari Birth Register Ex.P.8-A, the learned trial Judge convicted and sentenced the appellant as aforesaid in paragraph 1 (supra).

4. Learned counsel for the appellant has assailed the conviction of the appellant mainly on the ground that the appellant had a love affair with the prosecutrix who had consented to the sexual intercourse. This was proved by the medical report Ex.P.4 of Dr. (Smt.) M. Shrivastava P.W.3 who found no external injuries on the prosecutrix. In the alternative, he relied on a decision rendered in *State of Haryana v. Premchand* reported in 1998 M.P.W.N.[91] (SC) and prayed that since the appellant was a first offender and aged 19 years on the date of occurrence and had already undergone incarceration for a period of 4 years and 4 months, the sentence awarded should either be reduced to already undergone or the appellant should be given benefit of the Probation of Offenders Act. On the other hand, Shri Shukla, learned counsel appearing for the State has supported the judgment of trial Court and has contended that the case law cited by the counsel for the appellant has no application to the present case since the case in which the Apex Court granted benefit of Probation of Offenders Act to the appellant was one under Section 376 read with Section 511 of the I.P.C.

5. Having considered the rival submissions I have perused the record of the trial Court. The testimony of the prosecutrix P.W.9 clearly shows that while she was alone, the appellant entered the

house at about 12.00 noon and closing the door from inside committed rape on her. In paragraph 14, she has stated that the accused gagged her mouth, as a result of which, she could not shout at the time of the rape. The testimony of the prosecutrix not only inspires confidence and is wholly unrebutted in cross-examination but also finds support from the testimony of Dr. (Smt.) M. Shrivastava P.W.3 who found a tear in hymen with blood oozing therefrom and also found a tear in the forchette with slight oozing of blood.

6. Having given my thoughtful consideration to the evidence of the prosecutrix and the medical evidence, I am of the considered opinion that the trial Court has rightly held that the accused appellant had committed rape on the prosecutrix on 17.8.2001. So far as the age of the prosecutrix on the date of occurrence is concerned, the evidence of Romnath P.W.5 and the entry in the Kotwari Birth Register Ex.P.8-A conclusively establishes the date of birth of the prosecutrix to be 1.10.1986. The entry in the Register maintained by the Kotwar is a primary evidence for proof of age. Not only the trial Court while recording the evidence of the prosecutrix but Dr. (Smt.) M. Shrivastava P.W.3 and Dr. A.K.Sahu have also opined that the age of the prosecutrix was not more than 15 years on the date of occurrence. However, the primary evidence in the shape of Kotwar Birth Register Ex.P.8-A clinches the issue and proves beyond doubt that the prosecution was aged less than 16 years on the date of occurrence. In this view of the matter, the argument of the learned counsel for the

appellant that the prosecutrix had consented to the sexual intercourse due to a love affair with the appellant does not hold ground and becomes inconsequential.

7. Having thus considered the evidence led by the prosecutrix in its entirety, I am of the considered opinion that the learned trial Judge has rightly convicted the appellant under Section 450 and 376 of the I.P.C. The submission of learned counsel for the appellant that the appellant should be given the benefit of Probation of Offenders Act is unacceptable. So far as the sentence awarded by the trial Court under Section 376 I.P.C. is concerned, the submission made by the learned counsel for the appellant is that the appellant was aged only 19 years on the date of occurrence and had already undergone incarceration for about 4 years 4 months. Under Section 376(1), a minimum sentence of imprisonment of seven years is prescribed. Considering the facts and circumstances of the case and the age of the appellant on the date of commission of offence, ends of justice would be met if the sentence awarded to the appellant under Section 376 I.P.C. is reduced to R.I. for seven years.

8. In the result, the appeal is partly allowed. Conviction of the appellant for offences under Section 450 & 376 of the I.P.C. and the sentence awarded under Section 450 I.P.C. is maintained. The substantive sentence of imprisonment awarded by the trial Court under Section 376 I.P.C. is reduced to R.I. for 7 years.

Sd/-
Dilip Raosaheb Deshmukh
Judge